

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 26, 2006 Session

DEBRA ANN JEWETT v. ROBERT WILLIAM JEWETT

Appeal from the Chancery Court for Sumner County
No. 2004D-389 Tom E. Gray, Chancellor

No. M2005-00282-COA-R3-CV - Filed on July 31, 2006

This appeal involves a divorce decree entered in default against a non-resident. Appellant, Robert William Jewett, urges on appeal that the trial court erred in denying his Motion to Alter or Amend the default decree. We affirm the trial court's decree in its entirety and remand the case for further proceedings.

Tenn. R. App. R. 3 Appeal as Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Thomas Jay Martin, Jr., Gallatin, Tennessee, for the appellant, Robert William Jewett.

Joseph Y. Longmire, Jr., Hendersonville, Tennessee, for the appellee, Debra Ann Jewett.

MEMORANDUM OPINION¹

According to the Complaint filed in this action, the parties were married June 27, 1982, in Old Tappan, New Jersey. The parties separated in October 2001. At the time of the parties' separation, the marital residence had been established at 123 Shawnee Drive, Hendersonville, Tennessee. The parties have two minor children, the older of which will attain majority in February of 2007. Debra Ann Jewett ("Wife") filed her Complaint for Divorce on August 27, 2004. Wife filed a temporary parenting plan on September 20, 2004. On October 5, Chancellor Tom Gray entered an order approving the temporary parenting plan awarding custody of the children to Wife

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

and requiring Robert Jewett (“Husband”) to pay \$392 per week in child support. One day earlier Wife had filed a Motion for Default Judgment. That Motion was granted and a Final Decree entered on October 28, 2004. In that decree, the trial court granted a divorce to Wife based upon inappropriate marital conduct of the absent Defendant Husband. The court awarded primary custody of the parties’ children to Wife and required Husband to pay, by wage assignment, \$510.30 per week to Central Child Support Receipting Unit. Each party was awarded his and her separate personal property, and the marital estate was divided. The court made the following factual findings:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, **DEBRA ANN JEWETT**, is found by the Court to be forty-three (43) years old with a high school and college education, who has worked outside the home in the twenty-two (22) years marriage as a school teacher. Further said plaintiff, **DEBRA ANN JEWETT**, is vocationally limited in her ability to produce any income, when compared to that earning capacity of defendant, **ROBERT WILLIAM JEWETT**. Further, the Court has considered the factors set forth in T.C.A. § 36-5-101(d)(1)(A-E) and specifically finds that the plaintiff, **DEBRA ANN JEWETT**, is entitled to spousal support in the form of rehabilitative alimony. Further, the Court has considered the earning capacity of the defendant, **ROBERT WILLIAM JEWETT**, both past and present, as well as the standard of living enjoyed by the parties since marriage. Thus the Court finds that the plaintiff is entitled to rehabilitative alimony and thus the plaintiff, **DEBRA ANN JEWETT**, is awarded rehabilitative alimony in the sum of Four Hundred Fifty Dollars and 00/100 (\$450.00) per week paid by wage assignment from defendant’s employment at Barrett Builders, 2115 Linwood Avenue, Fort Lee, New Jersey 07024, beginning October 18, 2004 through October 18, 2014, due each Monday, which shall be by wage assignment order thru Central Child Support Receipting Unit. Said support shall terminate on the plaintiff’s death or remarriage or death of defendant, **ROBERT WILLIAM JEWETT**, and shall remain within the jurisdiction of the Court for future modifications upon proper showing.

On November 8, 2004, Husband made his first appearance by way of a Motion to Set Aside the Final Decree of Divorce, which the trial court treated as a Motion filed pursuant to the Tennessee Rules of Civil Procedure 60.02. In this Motion, Husband asserted that he had filed his own Complaint for Divorce in New Jersey Superior Court on July 23, 2004. He urged that on advice of counsel he acted on the misapprehension that this case was “being litigated in New Jersey.” On appeal, Husband argues that the trial court erred in denying his Motion to Set Aside the Judgment by Default.

In order to set aside an otherwise valid default judgment, the movant must show why he was justified in failing to avoid mistake or surprise. *See Hopkins v. Hopkins*, 572 S.W.2d 639, 640 (Tenn.1978). *Compare Tennessee Dept. of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn.1985). The court in *Barbee* noted that Rule 60.02 motions to set aside a default judgment should be liberally considered in favor of a defendant who has been prejudiced by the surprise. It

has also been said and well settled that Rule 60 relief should not be used to protect the movant from his own free and calculated choice of action, albeit ill informed and ill fated. *Day v. Day*, 931 S.W.2d 936, 939 (Tenn.Ct.App.1996). *See also Banks v. Dement Constr. Co.*, 817 S.W.2d a6, 19 (Tenn.1991). It bears noting that Husband does not challenge the method of service. He does not deny that he received a notice of the pending action. In fact, in support for his Motion to Set Aside the Default Judgment, Husband includes documents showing that he had retained local counsel in New Jersey as well as Tennessee. His sole argument on appeal is that, since the trial court granted almost every request made by the wife in this case while knowing that another state court arguably had jurisdiction, the entry of the court's decree amounts to the very unfairness that Rule 60 is designed to avoid. To the contrary, as this Court has said:

The concept of subject matter jurisdiction involves a court's power to adjudicate a particular type of controversy. *See Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632, 639 (Tenn.1996); *Turpin v. Conner Bros. Excavating Co.*, 761 S.W.2d 296, 297 (Tenn.1988). Courts derive their subject matter jurisdiction from the Constitution of Tennessee or from legislative act, *see Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn.1977); *Brown v. Brown*, 198 Tenn. 600, 618-19, 281 S.W.2d 492, 501 (1955), and cannot exercise jurisdictional powers that have not been conferred directly on them expressly or by necessary implication. *See Hicks v. Hicks*, No. 01A01-9309-CH-00417, 1994 WL 108896, at *2 (Tenn.Ct.App.Mar.30, 1994) (No Tenn.R.App.P. 11 application filed).

A court's subject matter jurisdiction in a particular circumstance depends on the nature of the cause of action and the relief sought. *See Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn.1994). It does not depend on the conduct or agreement of the parties, *see Shelby County v. City of Memphis*, 211 Tenn. 410, 413, 365 S.W.2d 291, 292 (1963); *James v. Kennedy*, 174 Tenn. 591, 595, 129 S.W.2d 215, 216 (1939), and thus the parties cannot confer subject matter jurisdiction on a trial or an appellate court by appearance, plea, consent, silence, or waiver. *See Caton v. Pic-Walsh Freight Co.*, 211 Tenn. 334, 338, 364 S.W.2d 931, 933 (1963); *Brown v. Brown*, 198 Tenn. at 618-19, 281 S.W.2d at 501.

Dishmon v. Shelby State Community College, 15 S.W.3d 477, 480 (Tenn.Ct.App.1999).

This case does not present excusable neglect under Tennessee Rule of Civil Procedure 60.02. The defendant, represented by counsel in New Jersey, made a conscious decision not to timely answer the Tennessee proceeding after he was properly served with process. In considering this Rule 60.02 Motion, the trial court observed:

The Court received an order on the temporary parenting plan, and the Court signed that order, and then the Court also directed that there be a wage assignment order issued to the employer of Mr. Jewett. And the Court on September the 20th directed that there be a wage assignment order. The motion for default was filed.

Notice was given as to the hearing date on March the 18th – – excuse me, not March the 18th, October the 18th, 2004, and the Court proceeded to hold a hearing. Mr. Jewett again elected not to appear. It wasn't because Mr. Jewett didn't know that the matter was going on in Tennessee. He made a conscious decision not to appear in this matter, and he had the notice. He also had an attorney.

Now, on the motion to set aside the final decree, it was argued that his attorney had not given him appropriate advice relative to jurisdiction of the state of Tennessee. If not given appropriate advice, I don't know, but certainly under law of New Jersey, federal law and Tennessee law, this Court had subject matter jurisdiction over these children over the parenting plan. Pursuant to Tennessee statutory law, specifically the Long Arm Statute, this Court had in personam jurisdiction over Mr. Jewett.

The trial court thereupon held under its December 7, 2004 order:

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that defendant's, ROBERT WILLIAM JEWETT, Motion to set aside Final Decree of Divorce, treated by the Court as a Motion pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure is hereby **DENIED**. The Court specifically finds that no mistake, inadvertence, surprise or excusable neglect of defendant existed in the record, inasmuch as the defendant, ROBERT WILLIAM JEWETT, was aware of the proceedings within the State of Tennessee in the above-styled matter, yet [chose] to ignore same until after the divorce action filed by said defendant, ROBERT WILLIAM JEWETT, in the State of New Jersey was dismissed by the State of New Jersey on or about October 22, 2004. Consequently, the Court **DENIES** the defendant's motion herein.

Ignorance of the law or misinterpretation by counsel and a failure to act in reliance upon such mistake is not "excusable neglect" as contemplated by Tennessee Rule of Civil Procedure 60.02. *Kilby v. Sivley*, 745 S.W.2d 284 (Tenn.Ct.App.1987); *Algee v. State Farm General Ins.Co.*, 890 S.W.2d 445 (Tenn.Ct.App.1994); *U.S. v. Erdoss*, 440 F.2d 1221, 1223 (2nd Cir.1971).

The judgment of the trial court is affirmed, and costs of the cause are assessed to Appellant, Robert William Jewett

WILLIAM B. CAIN, JUDGE